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In the Supreme Court of the United States

OCTOBER TERM, 1960

OTHO G. BELL, WILLIAM A. COWART, and
LEWIE W. GRIGGS, PETITIONERS

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinions in the United States Court of Claims (R. 33-46) are reported at 181 F. Supp. 668.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960 (R. 59). The petition for a writ of certiorari was filed on May 17, 1960, and was granted on June 27, 1960 (R. 59; 363 U.S. 837). The jurisdiction of this Court rests upon 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether petitioners, captured American soldiers who voluntarily served the enemy during the Korean hostilities and subsequently refused repatriation to this country, are entitled to pay and allowances for the period between their capture by the enemy forces and their discharge from the Army.

STATUTES INVOLVED

1. The Missing Persons Act, 56 Stat. 143, as amended, 50 U.S.C. App. 1001 *et seq.*, provides in pertinent part (as it appears in the United States Code):

§ 1001. *Definitions*

For the purpose of this Act [sections 1001-1016 of this Appendix]—

* * *

(b) the term "active service" means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a) (3) above;

§ 1002. *Missing, interned, or captive persons.*

(a) *Continuance of pay and allowances.*

Any person who is in the active service * * * and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged

by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same * * * pay [and allowances] * * * to which he was entitled at the beginning of such period of absence or may become entitled thereafter * * * and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period. * * *

§ 1009. *Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death*

(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential

date including that upon which evidence or information is received in such department or by the head thereof. * * * Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: * * * When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. * * *

2. R.S. 1288, 37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846, provides:

Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law.

STATEMENT

This suit was brought by three former members of the United States Army for pay and allowances for a period of time during the Korean hostilities in which they voluntarily served the enemy following their capture in combat.

1. *The stipulated facts*¹—Petitioners enlisted in the Army in 1949. In the Korean conflict, they were captured and detained by North Korean and Chinese Communist forces (Findings 2 and 3; R. 46-47). During the period of their detention, petitioners voluntarily and actively served the enemy. In the prisoner of war camps to which they were assigned, they acted as squad monitors or leaders; in that capacity, they procured communist propaganda, and forced American prisoners to read it and comment favorably upon it. Petitioners reported the names of prisoners who refused to comply. Upon the recommendations of petitioners, prisoners who disobeyed, criticized, or talked back to petitioners were punished, *e.g.*, by hard labor, reduced rations, or by being forced to stand all day in the sun or in an icy river (Findings 7, 14, 15, 18, 21, 25, 26; R. 47-48, 50-52, 54, 55).

¹ Petitioners did not agree in terms that the stipulated facts were true, but did agree that they "be deemed to have been elicited from defendant's witnesses testifying under oath"; and that they "have not been rebutted by plaintiffs or by plaintiffs' witnesses"; petitioners also waived their right to introduce any testimony in rebuttal of these facts (R. 8). The findings of fact were based primarily upon the stipulation (R. 46-59).

Petitioners also acted as the enemy's informers within the prison camps. They gave the Chinese the names of prisoners who planned to escape or otherwise resisted the enemy. As a result, loyal American prisoners were placed in solitary confinement, bayoneted, and punished in other ways (Findings 15, 21, 26; R. 51-52, 54, 55). At least one prisoner died as a direct result of such a report by petitioner Bell (Finding 15; R. 51).

Petitioners also engaged in extensive propaganda activities for the enemy, both within and without the camps. They wrote articles for enemy newspapers and magazines, delivered lectures, drew cartoons and posters, took roles in plays and moving pictures, signed and circulated petitions and letters, and made recordings for radio broadcasts. This propaganda, designed to assist the enemy's prosecution of the hostilities, generally condemned the United States and its government, while extolling the virtues of communism and the communist countries. Petitioners depicted the United States as an aggressor, described atrocities which they falsely said they saw American soldiers commit, and falsely described the conditions of the American prisoners of war as good. They testified to the use of germ warfare by the United States and, describing the American system of government as "fascistic", declared that life was better in China than in the United States (Findings 8, 9, 10, 11, 14, 19, 20, 27, 28; R. 48-51, 53, 55-56).

Petitioners consorted and mixed socially with enemy troops. They attended parties, visited Chinese company and regimental headquarters frequently, and

circulated with the Chinese officers, both inside and outside the prison camp. Petitioner Cowart lived in the Chinese regimental headquarters for some time (Findings 13, 22, 29; R. 50, 54, 57).

Each of the petitioners declared his hostility to the United States and pledged his adherence to the cause of the enemy. Petitioner Griggs wore a Chinese medal; Bell and Cowart wore the Chinese uniform and Chinese medals (Findings 25, 13, 21; R. 55, 50, 54). Bell stated that he wished to fight for China and against the United States, and had attempted to join the Chinese Army (Finding 12; R. 50). Cowart stated that he wished to study in China and then return to the United States to help in the overthrow of the American government (Finding 23; R. 54). Griggs stated that, if given a weapon, he would fight the forces of the United Nations in Korea, and expressed the willingness to "sell out" the United States for "a tailor-made cigarette" (Finding 28; R. 56). Each of the petitioners refused repatriation when it was offered after the signing of the Korean armistice, and elected to go to Communist China (Findings 16, 24, 30; R. 52, 54, 57).

Petitioners were administratively discharged from the United States Army in January 1954. They returned to the United States in July 1955 (Findings 16, 24, 30; R. 52, 54, 57).

2. *Proceedings below*—On November 8, 1955, petitioners filed claims with the Department of the Army for pay and allowances (R. 30-31). Their claims were denied on October 2, 1956 (R. 31-32). On December 31, 1956, petitioners brought suit in the

Court of Claims for pay and allowances from the date of capture to discharge (Petition, paras. III, VII, and X; R. 1-3).

In the court below, petitioners introduced no evidence, did not testify, and stipulated the facts summarized above pertaining to their conduct during the period involved (R. 8-19). The Government offered testimony to prove the falsity of some of the propaganda charges pertaining to "germ warfare" and other alleged American misconduct, but petitioners agreed that the charges were false (Finding 31; R. 57-58). The parties also stipulated that the net amounts due to petitioners, should their claims be allowed, would be as follows: Bell, \$1,455.29; Cowart, \$4,991.13; Griggs, \$2,810.14 (Finding 34; R. 58-59).

The court made findings and conclusions on the basis of the stipulation. After reviewing the evidence, the court stated in its opinion (R. 38, 40):

These and many other acts of perfidy are abundantly proved by the record and are nowhere denied either in the pleadings or in the evidence. The record does not disclose any suggestion whatever of brainwashing. As a matter of fact, the record justifies the conclusion that at all times these men did these acts voluntarily for the purpose of helping themselves, in complete disregard of the effect it might have on the treatment of their fellow prisoners. The record does not indicate a touch of loyalty either to their compatriots or to their country after the period they were taken prisoners of war.

* * * *

* * * The fact is that essentially they were not confined. They were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners.

Under these facts, the court held that petitioners were not entitled to pay under the Missing Persons Act, which was the only statute applicable to them, and therefore dismissed the petition (R. 39-40, 59).

SUMMARY OF ARGUMENT

By serving the enemy after capture, petitioners broke their oaths and obligations to render faithful service to the United States. Their right to the claimed pay for this period of disloyalty is dependent upon their bringing forward a statutory mandate to pay captured American soldiers even though they serve the enemy instead of this country. No such mandate exists.

I.

A. The Missing Persons Act does not confer the right to the pay in question upon petitioners. Since, under the undisputed facts found by the court below, petitioners were voluntarily serving the enemy after their capture, they could no longer be considered in the "active service in the Army * * * of the United States" within the meaning of the Act. 50 U.S.C. App. 1001, 1002, *supra*, p. 2. That Congress did not wish to pay all American soldiers captured by the enemy is shown by the specific provision that absentees and deserters *not* be paid under the Act; this

confirms the Congressional intent that pay is not earned by those who abandon their service and repudiate their allegiance to the United States by giving help to the enemy. Settled principles of military pay jurisprudence also support the result that servicemen who give up serving the United States—by desertion or by adherence to the enemy—are not entitled to pay. Nothing in the language or legislative history of the Missing Persons Act leads to a contrary conclusion.

B. Revised Statutes, Section 1288, which was originally enacted in 1814, covers the same subject matter as the Missing Persons Act—the right to pay of captured soldiers in the service of the United States. Any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act, which is the later and more comprehensive expression of Congressional purpose. Since petitioners have no right to recovery under the Missing Persons Act, they cannot prevail in this case.

At any rate, there is no more indication that Congress intended to pay soldiers, for a period during which they served the enemy, under R. S. 1288 than under the Missing Persons Act. The controlling factor is that, since petitioners were in the service of the enemy, they were not “in the service of the United States” within the meaning of R. S. 1288. Further, the court below found that, essentially, petitioners were not prisoners following their capture, but were treated as adherents of the Chinese Communists; therefore, they were not in “captivity” and are entitled to nothing under R. S. 1288.

II.

The other arguments set forth in support of petitioners' claims are likewise without merit.

1. Administrative determination of a soldier's entitlement to pay is specifically directed by the statute in the situation presented by this case. 50 U.S.C. App. 1002, 1009, *supra*, pp. 2, 3-4. Moreover, comparable administrative determinations are regularly made by the Army, and have been approved by this Court. A.R. 35-1030; *United States v. Landers*, 92 U.S. 77; *United States v. Kingsley*, 138 U.S. 87. A court-martial or criminal conviction is not a prerequisite to a ruling that no pay is owing. None of the Court of Claims cases cited by petitioners are to the contrary. Since the question presented by this case is the petitioners' initial right to the pay, not the taking away of pay once concededly due, there is no question of penal forfeiture or the administrative deprivation of accrued pay. In any event, there was a *de novo* trial below, and the Court of Claims judicially found on the undisputed evidence that petitioners had performed the acts of disloyalty with which they were charged.

2. The Army has made no determination that petitioners are not entitled to pre-capture pay, and petitioners did not sue for such pay. The issue of pre-capture pay was not properly raised in the Court of Claims, and is not properly in issue here.

3. Finally, the court below correctly refused to set forth a generalized "standard of conduct" for captured servicemen. Petitioners were not prejudiced

by this refusal, since the record clearly establishes their disloyalty and their abandonment of service to the United States. Petitioners, who stipulated the facts of their disloyalty and who did not testify in their own behalf, failed to establish their right to recovery. That is sufficient for this case. The Court of Claims was not required to rule on possible cases of disloyalty not presented by this record or on the cases of military personnel guilty of misconduct which does not amount to service to the enemy. Such instances are not before the Court and need not be decided.

ARGUMENT

Under the undisputed facts found by the Court of Claims, the petitioners gave aid and comfort to the enemy during a period of hostilities by informing on loyal prisoners, by attempting to lead them in enemy-oriented study groups, by engaging in enemy propaganda activities, and by renouncing allegiance to the United States and pledging support to the cause of the enemy. There is no indication on this record that petitioners' conduct was in any way coerced, and the record fully justifies the conclusion of the court below that their actions were voluntary (R. 38). Indeed, the fact that petitioners rejected repatriation and chose instead to go to Communist China makes clear their voluntary renunciation of allegiance to the United States. Accordingly, petitioners' actions, as revealed by the record and findings, not only constituted wilful breaches of their obligations to render

faithful service to the United States,² but also appears to have amounted to the military equivalent of treason.³

This case, therefore, is one in which the petitioners claim pay as soldiers from the United States for the time during which they admittedly served the enemy as informers, squad monitors, and propagandists. They assert no contractual or common law right to this pay, and we are aware of none. Any recovery on their part must be based upon statutory entitlement. If Congress directed that they should be paid in the circumstances presented by this record, they are entitled to recover; but if, on the other hand, Congress did not provide that they should receive pay, they have no valid claim. The question in the case, then, is one of statutory interpretation, and the function of this Court "is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Associations*, 310 U.S. 534, 542.⁴ As we now show, there was no Congress-

² "I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." 10 U.S.C. 501; see *Billings v. Truesdell*, 321 U.S. 542, 550.

³ See Art. 104 of the Uniform Code of Military Justice, 10 U.S.C. 904; *United States v. Dickenson*, 6 USCMA 438, 20 CMR 154; *United States v. Batchelor*, 7 USCMA 354, 22 CMR 144; see, also, Art. 105 of the Code, 10 U.S.C. 905.

⁴ Authorities which exalt "plain meaning" or "literal construction" over the manifested purpose and intent of Con-

sional purpose to grant pay to captured American soldiers who serve the enemy.

I.

Captured American Soldiers Who Serve the Enemy Do Not Possess a Statutory Right to Pay for That Period

A. *The Missing Persons Act does not grant the claimed pay to petitioners.*

1. The Missing Persons Act⁵ is comprehensive legislation governing the entitlement to pay and allowances of servicemen (and their dependents) who are missing, besieged, interned, or captured. Originally passed in 1942 as temporary legislation,⁶ the Act was amended and reenacted several times,⁷ and ultimately became permanent.⁸ It provides that any person "in the active service * * * who is officially determined to be absent in a status of * * * captured by a hostile force" is entitled to pay and allowances. 50 U.S.C. App. 1002, *supra*, pp. 2-3. The term "active service"

gress have lost any vitality they once may have had. *Boston Sand Co. v. United States*, 278 U.S. 41, 48; *United States v. American Trucking Associations*, *supra*; *United States v. Dickerson*, 310 U.S. 554; *Harrison v. Northern Trust Co.*, 317 U.S. 476; compare Petitioners' Brief, pp. 18-22.

⁵ 50 U.S.C. App. 1001, *et seq.*, *supra*, pp. 2-4.

⁶ Act of March 7, 1942, 56 Stat. 143. See S. Rep. No. 1060, and H. Rep. No. 1680, 77th Cong., 2d Sess.

⁷ Act of July 1, 1944, 58 Stat. 679; Sec. 4(e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20-21.

⁸ Act of August 29, 1957, 71 Stat. 491.

is defined as "active service in the Army * * * of the United States." 50 U.S.C. App. 1001, *supra*, p. 2.

As we have emphasized, the court below found as a fact that between the time of the petitioners' capture and the time of their discharge each of them "adhered to, worked for, and collaborated with the enemy of the United States" (R. 36). In other words, during their detention petitioners were in the service of the enemy, rather than in the service of the United States. Since they were in the service of the enemy, petitioners were not persons in "active service in the Army * * * of the United States * * * captured by a hostile force", and therefore are not entitled to pay even under the literal words of the Missing Persons Act. 50 U.S.C. App. 1001, 1002, *supra*, p. 2.

2. That Congress did not intend to pay American servicemen for a period during which they served the enemy is apparent from more than the bare language of the Missing Persons Act. It is difficult to see how the grant of pay to such individuals would provide for the common defense, or promote the general welfare, or advance any legitimate national policy or interest. Rather, a construction of the Act which would grant pay to such persons would lead to the incongruous result that soldiers who actually fight in the enemy's army, after capture, would also be entitled to pay under the Act. The intention to enact such legislation should not lightly be attributed to Congress, particularly in the absence of compelling statutory language or legislative history.

Although the Missing Persons Act does not specifically address itself to the problem of those com-

paratively few American soldiers who in the manner of petitioners break their obligations and oaths to serve the United States faithfully, the Act does contain a further indication that such persons should not be paid. It specifically provides that "[t]here shall be no entitlement to pay" for deserters and others absent without authority. 50 U.S.C. App. 1002, *supra*, p. 3. In a real sense, the entire pattern of petitioners' conduct after capture constituted an abandonment and desertion of their service and obligations to the United States." But even if their service to the enemy did not constitute "desertion" or "absence without authority" within the technical definition of those terms, the fact that Congress precluded payment to absentees confirms its intent not to pay those whose derelictions are more reprehensible and more harmful to the United States than mere absence. Desertion or absence without authority results merely in the failure of the soldier to serve his country. But when petitioners entered upon their course of conduct, not only did the United States lose their services, but the enemy acquired additional strength. Petitioners' service to the enemy strengthened the enemy's control over loyal American pris-

* The desertion or unauthorized absence for which the Missing Persons Act precludes pay need not antedate the serviceman's capture; it can commence after capture and while he is in the enemy's hands. For instance, soldiers who adhere to the enemy, after capture, and are therefore permitted by the enemy to leave the prison encampment and to live with the enemy (as was true of petitioner Cowart) seem to us clearly absent without proper leave from their post.

oners to their detriment,¹⁰ and gave the enemy a valuable propaganda weapon which seriously harmed the United States. Indeed, while petitioners did not bear arms against the United States, it was apparently only because the enemy determined that petitioners would be more useful to its cause as propagandists, informers, and camp guards than as fighting soldiers.¹¹ It would be strange to ascribe to Congress an intention to treat those guilty of such activities more favorably than mere absentees. Neither the language nor the legislative history of the Act provides support for such an anomalous result.¹²

¹⁰ As a result of petitioner Bell's activities as an informer, one loyal American died, another was bayoneted, and others were punished in various ways (Finding 15; R. 51-52). Cowart's and Griggs' activities as informers were similar, and Griggs participated in imposing punishments on loyal prisoners (Findings 21, 26; R. 54, 55).

¹¹ Petitioners Bell and Griggs explicitly stated their willingness and desire to fight for the Chinese Communists against the United States and her allies (Findings 12, 28; R. 50, 56). Petitioner Cowart, who wore the uniform of the Chinese Communists, stated that he hated America and wished "to help in the overthrow of the [American] Government" (Finding 23; R. 54).

¹² It should be noted that, in 1957, Congress amended the Act to allow the payment of pay and allowances to Philippine Scouts who had been captured but later paroled by the Japanese during the occupation of the Philippines, with the proviso that no Scout who had performed "actions . . . of a military nature hostile to the United States" should receive such pay. 50 U.S.C. App. 1002(b). Congress inserted the proviso "so that the case could not arise whereby a former Philippine Scout who had collaborated with the enemy would receive the back pay and allowances authorized by this bill." H. Rep. No. 204, 85th Cong., 1st Sess., p. 5. Congress in-

Moreover, in ascertaining Congressional intent in this area, settled principles of military pay jurisprudence cannot be overlooked. This Court has held that a criminal breach, by desertion, of a soldier's obligation to render faithful service to the United States is a breach of his oath and contract of enlistment,¹³ with the consequence that he is not entitled to pay for the period up to and including his desertion. *United States v. Landers*, 92 U.S. 77. In so holding, the Court observed (92 U.S. at 79):

* * * the contract of enlistment * * * is for faithful service. The contract is an entirety; and, if service for a portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial * * *.¹⁴

tended not to pay "those Scouts found * * * to have demonstrated by their acts abandonments of their loyalty to the United States." *Id.*, p. 6.

¹³ Of course, an enlistment is more than a contract of employment between private parties. *In re Grimley*, 137 U.S. 147; *In re Morrissey*, 137 U.S. 157. The differences, however, result from instances in which "private right is subordinated to the public interest." 2 Winthrop, *Military Law and Precedents* (2d ed.) 829-30.

¹⁴ It is important to stress that in *Landers* the Court specifically held that it was unnecessary to have a court-martial conviction for desertion in order to preclude the deserter from receiving pay for the past period, i.e., for the period prior to and including the time of desertion. The Court did hold that a court-martial was necessary, under the prevailing legislation, for a forfeiture of future pay to be earned after the deserter had returned to service and been restored to duty.

The *Landers* holding, which is still in force (A.R. 35-1030), accords with the general principles of the common law governing contracts between private persons, for it is axiomatic that one who wilfully commits a material breach of a contract can recover nothing under it. 4 Williston, *Contracts* (1936 ed.) § 1022, pp. 2823-4; 5 Williston, *Contracts* (1936 ed.) § 1477; 5 Corbin, *Contracts* (1951 ed.) § 1127, pp. 564-5, see also *Restatement Contracts*, § 357 (1) (a). There is no indication in the legislative history that Congress intended the Missing Persons Act to achieve a result contrary to *Landers*. Since one who commits a wilful and material breach of his contract of enlistment by deserting is entitled to no pay under the general pay legislation as well as under the Missing Persons Act, it follows that petitioners, whose breaches were of like character but more serious and harmful, are entitled to nothing.

3. The Missing Persons Act provides that determinations as to status and entitlement to pay are to be made administratively by the head of the department concerned, or his delegate, and that such determinations are to be "conclusive". 50 U.S.C. App. 1009, *supra*, pp. 3-4. The Court of Claims has previously held that such determinations are binding upon the courts, at least if they are not shown to be arbitrary. *Moreno v. United States*, 118 C. Cls. 30, certiorari denied, 342 U.S. 814; see A. R. 35-1325. That holding is obviously in accord with the statutory language and purpose.¹⁵

¹⁵ Any doubt as to the correctness of the Court of Claims' interpretation of the Act in this regard would be resolved

However, the decision in this case does not turn on the weight to be attributed to the administrative determinations adverse to petitioners, because (as we have shown above) on the *de novo* record made in the Court of Claims and that court's own findings petitioners do not come within the language or the purpose of the Act, and therefore are entitled to nothing under it. As the case comes to this Court, there need be no issue as to the reviewability or finality of administrative rulings. The court below has made its own determination on its own record. But it is appropriate to point out that Congress, in providing for administrative determination of eligibility under the Act, obviously did not require that a court-martial judgment (or other criminal conviction) be a prerequisite to denial of pay under the Act.

B. *Petitioners are not entitled to pay under R.S. 1288.*

1. The Missing Persons Act and the so-called Prisoners of War Act, R.S. 1288 (37 U.S.C. 242, formerly 10 U.S.C. (1952 ed.) 846), cover the same subject matter, and provide for the pay of captured American servicemen. As previously noted, the Missing Persons Act declares that "[a]ny person * * * in the active service [of the United States] * * * cap-

by the subsequent legislative history. Although the *Moreno* case was brought to the attention of Congress, and the Act was amended in response to the decision (see fn. 12, *supra*), the provisions concerning the conclusiveness of the administrative decision were reenacted without change. 50 U.S.C. App. 1009; Act of August 29, 1957, 71 Stat. 491; S. Rep. No. 970, 85th Cong., 1st Sess., p. 4.

tured by a hostile force" shall be entitled to the same pay and allowances while in such a status as he would otherwise be entitled. 50 U.S.C. App. 1002. Similarly, R.S. 1288 which was enacted in 1814 (3 Stat. 115) and has remained on the books since that time, provides that any soldier "in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity * * * the same pay, subsistence, and allowance * * *" as he would otherwise be entitled. 37 U.S.C. 242, *supra*, p. 4. Since the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject matter of R.S. 1288, any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act (see, e.g., *Posadas v. National City Bank*, 296 U.S. 497, 503-505). For example, as the Court of Claims properly noted, the provision of the Missing Persons Act providing for "conclusive" administrative determinations must prevail over R.S. 1288, which is silent as to who should determine the soldier's rights (R. 40). If, as we have shown above (and petitioners apparently now concede¹⁶), petitioners are not entitled to the pay under the Missing Persons Act, they cannot prevail at all.

¹⁶ Although petitioners advanced the Missing Persons Act as a basis for recovery in the court below (see p. 10, plaintiffs' brief in the Court of Claims), and in the petition for certiorari to this Court (Pet. 9), they apparently now concede that it does not give them any right to the pay in question, since in their brief on the merits they urge only R.S. 1288 as the basis for recovery (Pet. Br. 10-34; see, particularly, *id.*, at 31).

2. At any rate, the provisions of the two statutes are consistent at least insofar as they pertain to petitioners' rights in this case, on the *de novo* record made in the court below. Virtually the same considerations apply to R.S. 1288 as to the Missing Persons Act. The former provides that a soldier "in the service of the United States * * * shall be entitled to receive" his pay. 37 U.S.C. 242, *supra*, p. 4. Since petitioners were in the service of the enemy after their capture, they were no longer "in the service of the United States" under R.S. 1288.¹⁷ Again, R.S. 1288 provides for a soldier's pay only "during his captivity". 37 U.S.C. 242, *supra*, p. 4. The court below found, on the basis of the stipulated facts, that petitioners "were permitted to go outside the camp, were given practical freedom and in the essence of things they were no longer in the status of prisoners" (R. 40). This finding is warranted by the record (R. 11, 15, 18). This fact, plus petitioners' voluntary service to the enemy following their capture, as well as their refusal to leave the enemy when offered repatriation, show that following capture they were not in "captivity," but were in the voluntary service of the enemy. Since petitioners were not "in the service of the United States" and were not in "captivity" within the meaning of R.S. 1288, they are entitled to recover nothing under it. There is no more indication that Congress intended to pay soldiers under R.S. 1288 for a period during

¹⁷ Petitioners have omitted this requirement of R.S. 1288 in their line-by-line analysis of the statute and the facts in this case (Pet. Br. 10-11).

which they served the enemy than under the Missing Persons Act.

II.

The Decision of the Court Below Neither Alters the Administration of Military Pay Statutes Nor Threatens the Security of Future Soldiers

1. Petitioners refer to the fact that the original determination not to pay petitioners for the period following their capture was made administratively, while even a court-martial cannot normally forfeit accrued pay (but only future pay).¹⁸ The first answer to their objection to the administrative determination of petitioners' right to pay is that Congress unequivocally provided for such administrative determination in the Missing Persons Act. 50 U.S.C. App. 1009, *supra*, pp. 3-4. Moreover, administrative determinations that a serviceman is not entitled to pay are neither unprecedented nor unusual. On the contrary, the Army regulations provide for administrative determination, for pay purposes, of absence without authority even where there has been an acquittal by a court martial, or where the accused has not been brought to trial. A.R. 35-1030, para. 1. The administrative determination of desertion, to determine the right to past pay, has been approved by this Court. *United States v. Landers*, 92 U.S. 77; see *supra*, pp. 18, 19-20. Similarly, a soldier's right to pay for the period of detention by civil authorities if he is convicted for the civil offense, or if he is released without trial upon his promise to make restitution, is determined administratively. A.R. 35-1030, paras. 8 and 9.

¹⁸ See Art. 57, Uniform Code of Military Justice, 10 U.S.C. 857.

Petitioners also cite three earlier decisions of the Court of Claims for the proposition that determinations that a soldier is not entitled to pay cannot be made administratively. *Walsh v. United States*, 43 C. Cls. 225; *de L. Carrington v. United States*, 46 C. Cls. 279; and *White v. United States*, 72 C. Cls. 459. The first two hold merely that officers under charges awaiting court-martial are entitled under the governing legislation to allowances during the period before trial. The quoted passage from *White* (Pet. Br. 33-34) also must be read in the context of the situation there presented. In that case, a soldier who enlisted without knowledge that he was suspected of a crime was held by the civil authorities and charged with perjury, a charge which was later judicially determined to be unfounded. The Court of Claims found that he had served in the Army until precluded from doing so by circumstances beyond his control. On this finding, the court concluded that, under the applicable regulations, he was entitled to his pay for the period of his detention. The court indicated, however, that the result might have been different if the soldier had been aware of the charges pending when he enlisted, or if he enlisted to escape them. 72 C. Cls. at 465. Of course, in none of these three cases did any statute direct the Secretary of the Army to determine the soldier's rights administratively. Rather than being inconsistent with prior cases, the decision below approving the administrative determination follows the only judicial precedent truly bearing upon this case. *Moreno v. United*

States, 118 C. Cls. 30, certiorari denied, 342 U.S. 814 *supra*, p. 19.¹⁹

As part of the same argument, petitioners call the determination that petitioners were not entitled to pay a "forfeiture". There is, however, no forfeiture of pay once due. The sole question presented is petitioners' basic right to their pay—i.e., whether they ever became entitled to it—not the taking away of pay already earned, accrued, or due. The distinction between a forfeiture, which is a criminal penalty normally requiring determination by a court-martial, and determination of the initial right to pay, which does not involve any criminal proceedings, has been clearly drawn by this Court. *United States v. Kingsley*, 138 U.S. 87; see also *United States v. Landers*, 92 U.S. 77, 79, *supra*, pp. 18-19.²⁰ As we have

¹⁹ In this connection, we stress again that, as this case comes to this Court, it does not involve an administrative determination adverse to petitioners which has been left unreviewed or reviewed only to decide whether the administrative findings were arbitrary. There was a *de novo* trial of the facts in the Court of Claims, and that tribunal made its own findings on the basis of the record before it. This Court is asked to decide this case on the basis of fresh judicial findings, not merely on the basis of a departmental finding. See *supra*, pp. 19-20.

²⁰ If petitioners had not been discharged from the Army and therefore could be tried and convicted by court-martial, they would not be entitled to the pay they claim here. Article 57 of the Uniform Code (see *supra*, pp. 22-23) forbids a court-martial to forfeit accrued pay and allowances, but the pay involved here was *not* accrued and its denial would not be a forfeiture. If petitioners had been convicted by court-martial, the Department of the Army could properly refuse to pay them the amounts claimed here, as not being

noted, an administrative determination, subject to review by the courts, is the normal method of determining a soldier's right to pay.

2. Petitioners insist that the question of pre-capture pay was presented to the court below and is in issue here (Pet. Br. 23, fn. 7, 25-6, fn. 8). On the date of their capture, each of the petitioners had a balance due him, as follows: Bell, \$3.32, Cowart, \$39.34, and Griggs, \$63.33 (R. 62, 60, 61). The Department of the Army determined only that petitioners were not entitled to their pay "for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges" (R. 32). Similarly, in their pleadings in the Court of Claims, petitioners claimed pay and allowances only from the date of their capture until the date of their discharge (R. 1, 3). All of the judges in the court below, including the dissenting judge, understood that this case was limited to petitioners' claims for pay from the date of capture until the date of discharge (R. 33, 44). In these circumstances, it seems clear that petitioners did not properly raise the issue of pre-capture pay in the court below,²¹ and that the issue therefore is not ripe for

due to them at all. Judge Madden's suggestion to the contrary (R. 45-46) is solely based on his view that the pay had accrued—a position which we, of course, challenge as the basic error of his dissent.

²¹ It is true that the parties below stipulated, after the record was closed, the amounts due to petitioners if they should prevail, and that these amounts included the small sums of pre-capture pay; the record was reopened for the

decision by this Court. At any rate, the pre-capture pay can be treated in the same manner as post-capture pay, under the reasoning of this Court and the Army regulations. *United States v. Landers*, 92 U.S. 77, *supra*, pp. 18-19; A.R. 35-1030, para. 4.

3. Petitioners also argue that the court below failed to establish a "standard of conduct or care" (Pet. Br. 28-30), and that the security of "future servicemen" is therefore threatened. These arguments are without merit. All that was before the court below was the question of the right of these petitioners to the pay which they claimed on this record which showed their adherence to the enemy and their rejection of service to this country. The court did not have before it a case involving criminal conduct of a type not related to adherence to the enemy (*e.g.*, ordinary murder, theft, or assault), and was therefore not required to decide in what circumstances such criminal conduct (unrelated to serving the enemy) could amount to abandonment of service to the United States. Here, the decisive element was the record of petitioners' adherence to

purpose of receiving this stipulation (R. 19-20, 60-62). Thus, the amounts of the pre-capture pay were included in the record. However, this single reference to pre-capture pay, as part of a general computation designed to assess damages if petitioners prevailed on their whole claim, was inadequate to present the separate issue of pre-capture pay to the court below, particularly in view of the fact that pre-capture pay was not distinctly discussed in the briefs. The only reference in petitioners' brief to which we have been referred is, at best, ambiguous. See plaintiffs' brief in the Court of Claims, p. 15.

the enemy. Even as to that area, the court below was justified in not attempting to specify exactly what other disloyal conduct would be non-compensable under the statutes involved here. The line between loyalty and disloyalty in a prison camp may not always be an easy one to draw. Wherever that line may be drawn, however, the petitioners' conduct, as revealed by the record in this case and found by the Court of Claims, clearly establishes their disloyalty and their abandonment of their service and allegiance to the United States.

4. The Court of Claims noted in its opinion that, as claimants against the Government, petitioners were required to establish their right to recovery (R. 43). This is, of course, the normal rule. But petitioners claim that the burden placed upon them is harsh and inequitable because of their asserted lack of funds (Pet. Br. 26-28). It is difficult to understand how petitioners can make this contention in view of the fact that they elected not to testify in their own behalf. If, as they now imply, their demonstrated disloyalty to the United States did not commence upon capture or was somehow excusable, they had an opportunity to present their version of the events to the court below. By stipulating that they engaged in activities which gave aid and comfort to the enemy—without any qualification as to the time at which the disloyalty began, and without any suggestion of excuse—petitioners are not in a position to raise questions of burden of proof at the present stage, or to complain of the inferences which

the Court of Claims, as the finder of fact, drew from the stipulation.²²

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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DECEMBER 1960.

²² The stipulation indicates that Bell began to act as a squad monitor approximately one month after his capture (R. 8). The stipulation is silent as to when his other disloyal activities took place, as it is silent in regard to the precise time of the activities of Cowart and Griggs.